Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PETER N. FERNANDEZ, III., PETER N. FERNANDEZ, JR., AND KENNETH K. GETTY,

Petitioners,

v.

UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 666, 18 U.S.C., makes it a federal crime to bribe an agent or official of any government or entity that receives more than $10,000 in benefits under a federal program. In this case, the Seventh Circuit, ignoring contrary decisions of other circuits, held that the government does not need to prove a nexus between the federal benefits received and the acts of bribery.

The first question in this case is whether a defendant may be convicted under Section 666 where the government did not prove any nexus between the bribery and federal funds received by the state or local government entity at issue.

2. In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that materiality of falsehood is an element of the federal mail fraud statute. The court below held that petitioners' mail fraud convictions were sustainable even though neither the indictment nor jury instruction included materiality.

The second question in this case is whether the court below erred in sustaining petitioners' mail fraud convictions where neither the indictment nor the jury instruction included any reference to materiality.

RULE 14.1 STATEMENT

The parties to this proceeding are Peter N. Fernandez, III, Peter N. Fernandez, Jr., and Kenneth K. Getty.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 282 F.3d 500. The opinion of the district court (App., *infra*, 19a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2002. On May 24, 2002, Justice Stevens granted petitioners' application for an extension of time within which to file this petition for a writ of certiorari to and including August 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fifth and Sixth Amendments of the United States Constitution, 18 U.S.C. § 1341, 18 U.S.C. § 1346, 18 U.S.C. § 666, and Federal Rule of Criminal Procedure 52 are reprinted in the appendix at 25a-31a.

STATEMENT

1. Petitioners were charged with conspiring to commit mail fraud, money laundering and theft of federal funds in violation of 18 U.S.C. §§ 666, 1341, 1346, 1956-1957 in connection with an alleged conspiracy to rig local construction bids totaling about one million dollars. Following a two-week jury trial, petitioners were convicted on all counts. The district court rejected petitioners' post-trial motions and, sentenced petitioners to between 4 and 5.5 years in federal custody.

2. Petitioners all live and work in Lyons, Illinois. Fernandez, Jr. was part-owner of a design firm, and his son, Fernandez, III, was a construction superintendent for Industrial Construction ("Industrial"), a local construction company. Getty was a member of the Village Board of Lyons. In March 1996, after the Board president resigned, Getty was appointed to serve out his term (Tr. 266-269, 1422, 1447).

Prior to Getty's appointment as president, the Village Board had contemplated constructing a new public works building and renovating the village hall. Once in office, Getty dusted off the construction and renovation plans (Tr. 796-97), and obtained Board approval for the appointment of Fernandez, Jr.'s design firm as Village architect (Tr. 274-75, 1150, 1202). Shortly thereafter, the Board took bids for the construction of public buildings and renovations of the Village hall.

Fernandez, III successfully bid on the project on behalf of his nascent corporation, Midwest Industrial Construction, Inc. ("Midwest").[1] According to the government, Midwest benefitted from a skewed bidding process (Tr. 283-84, 1206-07). Work on the project began in October 1996, after the Village provided the contract-mandated 25% down payment.

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[1] Midwest was not formally incorporated until after Fernandez, III was awarded the contract, whereupon Fernandez, III incorporated the company and secured an employers' federal I.D. number and insurance (Tr. 1134-39, 1252-54, 1530). The mailing of Illinois incorporation documents and the securing of a federal employment tax number, insurance and bonding formed the basis of three of the mail fraud counts.

Midwest subcontracted the bulk of the construction to Industrial (Fernandez III's employer).[2]

In April 1997, after Getty lost re-election, the new Village administration stopped the construction projects, cancelled Fernandez, III's Village construction contract, and dismissed Fernandez, Jr.'s firm as Village architect. Industrial also fired Fernandez, III as its construction superintendent. During the late spring and early summer of 1997, Industrial was awarded "no-bid" contracts to complete the construction projects.

The indictment charged Getty, Fernandez, Jr. and Fernandez III with bid rigging. Before trial, petitioners stipulated that the Village of Lyons received over $10,000 in federal assistance in 1996 and 1997. The government, however, offered no proof that a federal interest was implicated by or federal funds were linked to petitioners' fraud, and the record contains no mention of how or why the Village of Lyons received federal funds or what programs the funds supported.

Trial commenced on October 13, 1998, and culminated in plenary adverse jury verdicts on October 27, 1998. The district court rejected petitioners' timely post-trial filings on December 9, 1998. On November 4, 1999, the district court rejected petitioners' supplemental post-verdict filings, which invoked the intervening decision in *Neder* v. *United States*, 527 U.S. 1 (1999). See App., *infra*, 22a-24a.

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[2] Various contractors working on the project were paid by Fernandez, III after he received payments from the Village. Those payments provided the basis for two mail fraud counts. The eight money laundering counts involved payments from Fernandez, III to subcontractors.

3. On direct appeal, petitioners argued that their federal bribery convictions under § 666 could not stand because the government failed to prove the required nexus between federal funding received by the Village of Lyons and the monies spent on the village construction project. Petitioners also contended, *inter alia*, that because neither the indictment nor jury instructions embraced "materiality," the mail fraud counts under 18 U.S.C. §§ 1341 and 1346 were subject to reversal.[3]

The court of appeals affirmed. App., *infra*, 17a-18a. The Court held that under 18 U.S.C. § 666, the government need not demonstrate a nexus or link between federal funding received by the Village of Lyons and the monies spent on the construction projects that were the subject of the alleged bid rigging. App., *infra*, 17a. Relying on its prior precedent, the court explained that "money is fungible and transcends program boundaries." App., *infra*, 18a (quoting *United States* v. *Grossi*, 143 F.3d 348 1350 (7th Cir. 1998)). Accordingly, the court held that the parties' pre-trial stipulation that Lyons received more than $10,000 in federal funds was sufficient under § 666, and that it was not necessary for the government to "further establish a link between the defendants' fraud and a federal interest." App., *infra*, 18a (citing *Grossi*).

The court of appeals similarly rebuffed petitioners' *Neder* argument. The Court acknowledged that *both* the indictment and the jury instructions failed to allege the essential element of materiality, but concluded that, taken as a whole, they "encompassed the concept of materiality" and therefore that

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[3] On direct appeal the government conceded that if the mail fraud counts were reversed, the money laundering counts would necessarily fall (U.S. Br. on Appeal at 43 n.4).

there was no plain error. App., *infra*, 14a-15a (indictment). See also *id.* (holding jury instructions "viewed in their entirety adequately embraced the concept of materiality"). The court of appeals ruled in this manner, even though it admonished the district court that, "given the Court's ruling in *Neder*, district courts should include materiality in the jury instructions for § 1344." App., *infra*, 14a-15a n.6 (quoting *United States* v. *Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 1999)).

REASONS FOR GRANTING THE PETITION

The Seventh Circuit determined that 18 U.S.C. § 666 does not require the Government to prove a nexus between the allegedly corrupt transaction and the expenditure of federal funds. This holding deepened the split among the circuits over the interpretation of § 666. This Court should grant review to resolve this matter of great import for federal/state relations.

In addition, the court of appeals fundamentally departed from this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), in holding contrary to *Neder*, that neither the indictment nor jury instructions need expressly direct the jury's attention to the essential element "materiality." App., *infra*, 14a-15a.

I. The Court Should Grant Review To Decide Whether 18 U.S.C. § 666 Requires The Government To Prove A Nexus Between The Alleged Illegal Conduct And The Expenditure of Federal Funds.

Section 666 of Title 18, entitled "Theft or bribery concerning programs receiving Federal funds," prohibits an "agent" of a local government (or agency thereof) from "obtain[ing] by fraud" property (valued at $5,000 or more)

owned or controlled by a governmental organization that receives at least $10,000 per year under a federal program.

Congress enacted § 666 in 1984 in response to the inadequacy of earlier federal statutes aimed at protecting federal funds. See generally George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 247-49 (1998). Before the enactment of § 666, the federal government could not prosecute the theft of money disbursed under federal grants if title to the funds had either passed to another entity or had become so commingled with a governmental entity's assets that the "federal character" of particular funds could not be shown. See S. REP. NO. 98-225, at 369-70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11. Section 666 was enacted to fill gaps in the prosecution of "significant acts of theft, fraud, and bribery *involving Federal monies*." *Id.* at 369, 1984 U.S.C.C.A.N. at 3510 (emphasis added).

Citing federalism concerns associated with the potential breadth of the new statute, some courts interpreted § 666 as requiring the Government to prove that a defendant's alleged fraud affected the actual funds disbursed by the federal government. Other courts interpreted the statute more broadly. see *United States* v. *Zwick*, 199 F.3d 672, 679-80 (3d Cir. 1999) (describing split is authority). In *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court intervened to resolve the split in authority.

Salinas was the deputy sheriff of Hidalgo, Texas, and he allowed a federal prisoner being held in a county jail to have "contact visits" with his wife and girlfriend in exchange for payments. 522 U.S. at 54-55. Because the county received

payments of over $10,000 and the bribes involved business of over $5,000, Salinas was charged with violating § 666(a)(1)(B). *Id.* at 55. Salinas, however, argued that the Government had to prove that the bribes affected federal funds in some way, "for instance by diverting or misappropriating them," before the government could prosecute him under § 666. *Id.* at 55-56.

The Court held that the statutory language was "unambiguous *on the point under consideration* * * * and [did] not require the Government to prove federal funds were involved in the bribery transaction."522 U.S. at 60 (emphasis added). Finding the statute constitutional as applied to Salinas, the Court limited the extent of its holding: "The preferential treatment accorded to [the federal prisoner] was a threat to the integrity and proper operation of the federal program. Whatever might be said about [the statute's] application in other cases, [its] application * * * to Salinas did not extend federal power beyond its proper bounds." *Id.* at 61. However, the Court expressly left unanswered the question presented in this case:

> We need not consider *whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds*, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves. And that relationship is close enough to satisfy whatever connection the statute might require.

Id. at 59 (emphasis added).

A. The Circuits Are Divided.

The federal courts are divided over the question left open in *Salinas*. The Sixth and Seventh Circuits have determined that

§ 666 requires no nexus between the alleged offense conduct and a federal government interest. See *United States* v. *Fernandez*, 282 F.3d 500 (7th Cir. 2002); *United States* v. *Suarez*, 263 F.3d 468, 489-91 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1547 (2002); *United States* v. *Dakota*, 197 F.3d 821, 826 (6th Cir. 1999); *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir. 1998).[4] In contrast, the Second and Third Circuits have read § 666 to require proof of a federal interest in the offense conduct. See *United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999); *United States* v. *DeLaurentis*, 230 F.3d 659, 661-62 (3d Cir. 2000); *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999); see also *Suarez*, 263 F.3d at 488 (Boggs, J., dissenting); *United States* v. *McCormack*, 31 F. Supp. 2d 176, 189 (D. Mass. 1998).

The position of the Fifth Circuit is unclear. See *United States* v. *Reyes*, 239 F.3d 722, 735 (5th Cir.) (rejecting argument that § 666 requires the government to "tie the federal monies to the *specific project* involved in the illegal activity") (emphasis added) (relying on *United States* v. *Moeller*, 987 F.2d 1134, 1137 (5th Cir. 1993)), *cert. denied*, 122 S. Ct. 156 (2001); *United States* v. *Phillips*, 219 F.3d 404, 413-14 (5th Cir. 2000) ("there must be some nexus between the criminal conduct and

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[4] Although the Eighth Circuit has not ruled on the issue, Judge Bye opined that the plain text of § 666 does not include a nexus requirement and that the courts should not read such a requirement into the statute. *United States* v. *Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., specially concurring), *cert. denied*, 122 S. Ct. 62 (2001). Judge Bye concluded that the statute is unconstitutional because in enacting the statute Congress exceeded its power under the Spending Clause, Art. I, § 8, cl. 1. *Id.* at 1074-75; see also *United States* v. *Sabri*, 183 F. Supp. 2d 1145 (D. Minn. 2002)

the agency receiving federal assistance") (quoting *Moeller*, 987 F.2d at 1137).

In the decision below, the Seventh Circuit reaffirmed its position that no nexus requirement exists. Relying heavily on its previous decision in *Grossi*, the court held that the government need prove only that the government agency or entity in question received more than $10,000 in federal funds. In *Grossi*, the Seventh Circuit upheld the conviction of a township supervisor who accepted bribes from a chiropractor in exchange for payment of overdue chiropractor bills out of the townships general assistance program funds. Although the township received federal funds, its general assistance program was funded from purely state and local sources. The court nonetheless held the federal bribery conviction to be proper:

> [M]oney is fungible and its effect transcends program boundaries. The general assistance program has more to spend on welfare (or dangle as a lure for bribes) if the federal government meets some of the Township's other expenses.

143 F.3d at 350.

Like the Seventh Circuit, the Sixth Circuit interpreted § 666 to require no connection between the offense conduct and the expenditure of federal funds. See *Suarez*, 263 F.3d at 489-91; *Dakota*, 197 F.3d at 826. In *Dakota*, an agent for the Keweenaw Bay Indian Community was convicted under § 666 for receiving kickbacks on the lease of gaming machines to be used in the tribe's casino. 197 F.3d at 824. The tribe received over $10,000 in federal funding through various federal programs, none of which was related to the casino operation. *Id.* Acknowledging

that *Salinas* left open the question of whether a nexus is required between the corrupt activity and the federal funding, the court rejected Dakota's argument that there must be at least some connection between the kickbacks and the federal funding received by the tribe. *Id.* at 826 (relying on its pre-*Salinas* decision in *United States* v. *Valentine*, 63 F.3d 459, 464-65 (6th Cir. 1995)). See also *Suarez*, 263 F.3d at 489-91 (reaffirming decision in *Dakota* over dissenting opinion of Judge Boggs).

In direct conflict with the Sixth and Seventh Circuits, the Second Circuit held that the government must prove some connection between the federal funds received by the government agency or entity and the offense conduct. In *Santopietro*, the court considered a scheme by city officials in Waterbury, Connecticut, to influence decisions by various city agencies in return for bank loans and cash payoffs from local businessmen. 166 F.3d at 91. During the relevant years, Waterbury received more than $10,000 for housing and urban development programs. Explaining that the government could not use § 666 to prosecute "a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000," the court noted that § 666 "requires at least some connection between the bribe and a risk to the integrity of the federal funded program." *Id.* at 93 (citing *Foley*). Applying this rule, the court held that the government failed to prove the required nexus:

> Since federal funds were received by Waterbury for housing and urban development programs and the corrupt payments concerned real estate transactions within the purview of the agencies administering federal

> funds, the requisite connection between the bribes and the integrity of federally funded programs is satisfied. Thus, this is not a case where the transactions sought to be influenced concerned one department of a city and the requisite $10,000 of federal funds were received by a totally unrelated department.

Id. at 93-94 (footnote omitted).

Similarly, in the Third Circuit, the government must prove some connection between the offense conduct and federal funds or programming. In *Zwick*, the Third Circuit vacated an elected township commissioner's three § 666 convictions because his offense conduct—accepting bribes for sewer access, use permits, and landscaping performance bonds—bore "no obvious connection" to the Federal Government's disbursement of funds to the township for emergency snow removal and for the prevention of stream bank erosion. 199 F.3d at 687-88. Noting that "[t]he goal [of § 666] was to overcome impediments to reaching actions in which there was a federal interest, not to federalize crimes in which a federal interest was lacking," *id.* at 684, the court refused to transform § 666 into a general anti-fraud statute encompassing any fraud against all local and state governments that receive over $10,000 in federal funds. *Id.* at 687-88. See also *DeLaurentis*, 230 F.3d at 661-62 (reaffirming nexus requirement and finding it satisfied where police detective was taking bribes, and the police department that paid his salary received $75,000 in federal funding to support local police patrols).

As the above summary indicates, the circuits are divided over the reach of § 666. Because the decision below squarely

presents the question dividing the circuits, further review by this Court is warranted to resolve the conflict.

B. The Issue Presented by the Conflict is Recurring and of Great Importance

The Court should grant review because the proper interpretation of § 666 is of great practical and doctrinal significance. Section 666 is an important (and growing) part of the federal criminal code, and is the subject of frequent litigation in federal courts. See George D. Brown, *supra* at 248-49 (describing the "extraordinary development" in prosecutions under § 666, and noting the rise in prosecutions of "local" corruption through § 666). All states, as well as numerous cities and towns, receive at least $10,000 in federal funds. See *id.* at 276 & n.236 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FEDERAL EXPENDITURES BY STATE FOR FISCAL YEAR 1995, at 1). If receipt of $10,000 in federal funds suffices to trigger § 666, state prosecution of bribery and theft will be superseded by federal prosecutions for the same offenses. This is consistent with neither the stated purpose of § 666 nor with constitutional concepts of federalism as established by this Court.

1. The congressional purpose in enacting § 666 was not simply to create a general anti-fraud statute to govern fraud against local governments and their agencies—an area already thoroughly policed by state laws—but to "protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery." See S. REP. NO. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511. Congress passed § 666 to "create new offenses to

augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery *involving Federal monies* that are disbursed to private organizations or State and local governments pursuant to a Federal program." *Id.* at 369, 1984 U.S.C.C.A.N. at 3510 (emphasis added).

Congress's stated intent was the protection of *federal money*. Protection of federal funds may have the beneficial secondary effect of protecting the recipients of federal monies, but that was not Congress's purpose. Congress did not embark on the radically expansive course of regulating *all* fraud perpetrated in local governments regardless of its connection to federal disbursements. Indeed, the title of § 666—"Theft or bribery concerning *programs receiving Federal funds*"—reflects the limited expansion of federal power that Congress intended the statute to effectuate. See *Zwick*, 199 F.3d at 682.

2. the Seventh Circuit's interpretation of § 666 would violate the Constitution. In *Fischer* v. *United States*, 529 U.S. 667 (2000), this Court explicated the term "benefits" in § 666(b), and rejected a "broad, almost limitless" interpretation of that term based on a fear that "[d]oing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Id.* at 681. In dissent, Justice Thomas (joined by Justice Scalia) further highlighted the federalism concerns raised by the Sixth and Seventh Circuits' interpretations of § 666:

> Without a jurisdictional provision that would ensure that in *each* case the exercise of federal power is related to the federal interest in a federal program, § 666 would

> criminalize routine acts of fraud or bribery, which, as the Court admits, would "upse[t] the proper federal balance."

Id. at 689 n.3 (Thomas, J., joined by Scalia, J., dissenting). Thus, in *Fischer*, this court unanimously recognized the serious constitutional problem of interpreting § 666 without reference to the federal interest behind the jurisdictional amount of federal funds.

Relying on this Court's analysis in *Fischer*, Judge Boggs, in his dissent from the Sixth Circuit's decision in *Suarez*, explained that any reading of § 666 that does not require a nexus between the offense conduct and federal funds is "no longer tenable." 263 F.3d at 486-87 (Boggs, J., dissenting). Judge Boggs emphasized this Court's close scrutiny of jurisdictional requirements for federal criminal laws regulating local conduct and the associated federalism concerns: "[T]he reservation of a 'generalized police power to the States is deeply ingrained in our constitutional history.'" *Id.* at 486 n.7 (quoting *United States* v. *Morrison*, 529 U.S. 598, 619 (2000)).

3. If interpreted not to require some connection between federal monies and the offense conduct, § 666 has a virtually unlimited scope and butts against the constitutional limits of Congress's delegated powers.

Courts that have considered the question have concluded that Congress enacted § 666 under its spending power. See *McCormack*, 31 F. Supp. 2d at 186 n.18 (collecting cases); see also *Fischer*, 529 U.S. at 689 n.3 (Thomas, J., dissenting). The Spending Clause provides that Congress has the "Power To lay

and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Congress may use its spending power to regulate the conduct of state and local governments by attaching strings to the federal funds that they receive. See *South Dakota* v. *Dole*, 483 U.S. 203, 206-07 (1987). However, the exercise of federal power under the Spending Clause must be related "to the federal interest in *particular* national projects or programs." *Id.* at 207 (emphasis added and quotation omitted); *id.* at 213 (O'Connor, J., dissenting). See also *New York* v. *United States*, 505 U.S. 144, 167 (1992) (without "relatedness" limit, "the spending power could render academic the Constitution's other grants and limits of federal authority").

Requiring the government to prove connection between a federal interest and federal funds in prosecutions under § 666 is consistent with the requirement that regulation under the Spending Clause be related to "particular" programs and not the simple disbursement of federal funds.[5]

4. In practice, the Seventh Circuit's decision here, as well as the Sixth Circuit's decisions in *Dakota* and *Suarez*, endorses application of § 666 as a general anti-fraud statute and allows

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[5] In opining that § 666 is unconstitutional, Judge Bye relies not on the lack of a nexus requirement, which he contends cannot be read into the statute, but that "[t]he Spending Clause nowhere authorizes Congress to criminally legislate." *Morgan*, 230 F.3d at 1074 (Bye, J., specially concurring). Judge Bye notes that, insofar as he is aware, § 666 is the only federal criminal statute enacted pursuant to Congress's spending power. *Id.* at 1075.

the Federal Government to encroach on an area "where States historically have been sovereign." *United States* v. *Lopez*, 514 U.S. 549, 564 (1995). If no nexus is required between the offense conduct and the expenditure of federal funds or a federal interest, then § 666 transforms traditionally local crime (*e.g.*, simple fraud) into a federal offense. Such a reading of § 666 thrusts the federal government into prosecuting "conduct readily denounced as criminal by the States." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). "If little or no nexus were required, [§ 666's] sweep would be truly stunning." Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L. J. 699, 710 (2000).

Indeed, if § 666 is given a wide-ranging interpretation such that the mere receipt of federal funds is a sufficient basis to sustain federal interference in the administrative functions of state and local governments, then Congress could use its power of the purse as a vehicle to impose any number of federal requirements on the management and administration of state and local governments, all under the guise of protecting the integrity of federal funds.

Accordingly, this Court should grant review to provide uniformity in the "sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (internal quotation marks omitted).

* * *

In short, the conflicting circuit court decisions effectively create two different statutes—and "the law" becomes what circuit judges decide in individual cases. In the words of Justice White:

> The statute at issue defines a federal crime, and it should be applied uniformly throughout the United States. Yet, because of conflicting interpretations, defendants in some parts of this country may be punished for violations without proof or pleading of an element required in another judicial circuit. Criminal culpability for violation of federal statutes should turn on uniform law, not geography.

Wilkes v. *United States*, 469 U.S. 964, 965 (1984) (dissenting from denial of certiorari). This case presents the Court with the opportunity to provide a definitive and unifying interpretation of § 666.

II. Materiality Is An Essential Element Of Mail Fraud On Which The Jury Must Be Expressly Instructed.

1. In *United States* v. *Gaudin*, 515 U.S. 506 (1995), the Court reminded the motivated reader: "We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 515 U.S. at 509-10 (citing *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993)).

2. In *Neder* v. *United States*, 527 U.S. 1 (1999), the Court considered materiality *vel non* and the harmless-error doctrine

in a case involving mail, wire and bank fraud. Chief Justice Rehnquist, delivering the majority opinion, concluded that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Id.* at 25. Because Neder had challenged the failure to instruct on materiality in the district court, this Court remanded for harmless-error analysis. *Id.* Justice Scalia, in partial dissent (joined by Justices Souter and Ginsburg), explained that any harmless-error analysis was indecorous because "depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of every element of the crime charged—can never be harmless." *Id.* at 30 (Scalia, J., dissenting). Justice Scalia insisted that the Sixth Amendment foreclosed any suggestion regarding the application of the harmless-error doctrine because the failure to have the jury determine guilt based on every essential element of the crime charged rose to the level of "structural error." *Id.* at 33 (emphasis added). In this case, the court of appeals eschewed both structural and harmless- error, opting instead for a benign "plain error" analysis. App., *infra*, 13a-14a. The court of appeals was dead wrong.

To begin, on July 1, 1999, almost six months before the district court sentenced petitioners to prison, petitioners submitted a post-trial filing urging conviction vacation of the mail fraud count based on this Court's June 10, 1999 decision in *Neder* (Rec. 99-4410 at R. 116, 120). On November 4, 1999, the district court rejected the *Neder*-inspired filings, ruling, *inter alia*, that there was no merit to the petitioners' *Neder* importunings (*id.* at R. 122). Even though petitioners raised *Neder* before the district court, in its decision, the court of appeals omitted any mention of petitioners having raised *Neder*

six-months in advance of sentencing, and thereafter erroneously applied a nebulous plain-error standard while rejecting *Neder's* essential "materiality" elements requirement. App., *infra*, 12a-15a. Stated otherwise, the court of appeals determined that neither Chief Justice Rehnquist's majority opinion, nor Justice Scalia's partial dissenting opinion mandated any error—plain, harmless or structural. Harmless-error analysis means that the reviewing court must determine "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. An otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Neder*, 527 U.S. at 15-16 (citations omitted).[6] In juxtaposition, the plain-error doctrine has a quartet of components, and before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met an appellate court has discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. See *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002). Here, the court of appeals shifted the blame for not including materiality in either the superseding indictment or jury instructions to petitioners and, *sub silentio*, concluded (by substituting themselves for the jury) that petitioners' *Neder* arguments were for naught. Such burden-shifting reasoning was rejected by the Court in both *Sullivan* v. *Louisiana* and *United States* v. *Gaudin*.

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[6] In *Neder*, the harmless-error standard was invoked in accordance with Fed. R. Crim. P. 52(a). 527 U.S. at 7-8.

3. The district court record revealed that each petitioner testified, denying they had conspired to rig the bids for the Village of Lyons construction projects. Peter Fernandez, III, testified that he had agreed with his employer (Industrial) that he would forego any commission on the Lyons construction project so long as Industrial acted as the subcontractor and allowed him to act as the construction superintendent (Tr. 1079-87, 1116-18).

To further explain: Getty became Village president in 1996 and hired Peter Fernandez, Jr. as Village architect. His son, Fernandez, III was working as a construction superintendent for Midwest Industrial, a local general contractor. Open-bids for the construction project were advertised in a local newspaper (Tr. 361-65, 1380). The government alleged that the bidding process was skewed such that Fernandez, III got the $1 million dollar construction project before forming his corporation and getting necessary insurance, etc.[7] However, he adhered to the terms of the construction contract and the project was 85% completed when Getty was ousted by a political rival in March 1997. Fernandez, Jr. was then dispatched as the Village architect and Fernandez, III's contract was aborted. The newly-elected Village president and Board thereafter awarded Midwest Industrial (Fernandez, III's erstwhile employer) a no-bid contract to complete the project.

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[7] The Board members who voted to award Fernandez, III the construction contract knew that he was the son of Fernandez, Jr., the Village architect (Tr. 283-84, 1206-07).

Given the testimony provided by the petitioners, it blinks-at-reality to think even for a moment that the "materiality" essential element was not a decisive jury issue. Had the jury been properly instructed that in order to return guilty mail fraud verdicts the scheme-to-defraud must have embraced the essential "materiality" element or component. Can it be gainsaid that a guilty verdict would have necessarily been returned where, as here, the termination of the (almost completed) construction project was not because the petitioner "ripped off" the Village but, rather, because Getty was dethroned as Village president? Stated otherwise, where the "intent" to embark on a scheme to defraud is squarely controverted before the jury, can mail fraud guilty verdicts be sustained where the jury was not instructed that shortcomings in the bidding process were material to the charged scheme-to-defraud? Petitioners contend that *Neder* provides the complete answer.

4. The amorphous phrase "honest services" cannot be disregarded as recently revealed by the divided Second Circuit opinion in *United States* v. *Handakas*, 286 F.3d 92 (2002). In *Handakas*, the court examined §§ 1341 and 1346, noting that both are confusing and wrapped with ambiguity as revealed by conflicting decisions from the courts of appeals, 286 F.3d at 101-11 (collecting conflicting circuit decisions regarding §§ 1341 and 1346). The *Handakas* majority held that the fair notice due process guarantees were violated based on the ambiguities in § 1346 and it reversed the mail fraud conviction. *Id.* at 107, 112 (finding § 1346 unconstitutionally vague as applied). This petition provides an appropriate vehicle for

resolving the circuit discord and lack of uniformity in mail fraud-"honest services" cases.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] Both the *Handakas* majority and the dissent considered the plain error doctrine with the majority rejecting the need for plain error analysis but, nonetheless, holding that if that doctrine were applicable, reversal would still be mandated. 286 F.3d at 111 (also explaining that the plain error rule is less rigid when reviewing a potential constitutional error).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 99-4203, 99-4205 and 99-4210

UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

v.

PETER N. FERNANDEZ, III, PETER N. FERNANDEZ, JR., and KENNETH K. GETTY
Defendant-Appellants.

February 21, 2001, Argued and Submitted,
March 7, 2002, Decided

Before POSNER, KANNE, AND DIANE P. WOOD, Circuit Judges.

KANNE, Circuit Judge:

On October 27, 1998, defendants Peter N. Fernandez, Jr., Peter N. Fernandez, III, and Kenneth K. Getty, were convicted of eight counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1346, four counts of theft of funds in violation of U.S.C. § 666, five counts of engaging in monetary transaction in property derived from unlawful activities in violation of 18 U.S.C. §1957, and four counts of money laundering in violation of 18 U.S.C. § 1956. The indictment provided that between the summer of 1996 and April 1997, defendants engaged in a scheme designed to defraud the Village of Lyons by rigging bids submitted for municipal building projects and then laundering the proceeds. On appeal, defendants argue that their convictions should be vacated because: (1) their activities fell beyond the purview of 18 U.S.C. § 1341, (2) neither the mail fraud counts nor the jury instructions embraced "materiality" as an essential element of the offense, (3) independent of the mail

fraud counts, the money laundering counts cannot survive, (4) the jury instructions regarding the elements of money laundering were inconsistent and contradictory, and (5) the government failed to establish a necessary element of the alleged 18 U.S.C. § 666 violations. We find each of these arguments to be unpersuasive and affirm the defendants' convictions.

I. HISTORY

Defendants were charged with eight counts of mail fraud, four counts of theft of funds, five counts of engaging in monetary transaction in property derived from unlawful activities, and four counts of money laundering. In essence, the indictment alleged that defendants engaged in a scheme designed to defraud the Village of Lyons by rigging bids submitted for municipal building projects and then laundering the proceeds. Each defendant entered a plea of not guilty. A jury convicted each defendant on all counts and the district court sentenced Getty to 66 months imprisonment, Fernandez, Jr. to 60 months imprisonment, and Fernandez, III to 48 months imprisonment.

The Village of Lyons is a municipal corporation and a political subdivision of the State of Illinois. Getty served as one of six elected trustees on the Lyons' Board of Trustees from 1991 until March 1996. As a trustee, Getty received a modest salary of $3,400 per year. In addition to being a trustee, Getty also owned his own insurance business, Kenneth K. Getty Insurance Company. On March 19, 1996, the presiding mayor of Lyons resigned for personal reasons. The Board then selected Getty to serve as acting mayor until April 1997.

Shortly after becoming acting mayor, Getty took certain steps to centralize his power. For example, Getty caused the village manager, who oversaw the day-to-day operations of Lyons, to be terminated without cause. Within weeks of the village manager's termination, the position was eliminated.,

and Getty assumed the village manager's full-time duties. Additionally, Getty sought to complete certain municipal building projects in Lyons in order to increase his chance of success in the next mayoral election. The projects included the renovation of the Village Hall and the construction of a new Village Public Works garage.

Getty consulted with his friend, Peter Fernandez, Jr., regarding the two building projects. Fernandez, Jr. was the sole owner of Norman-Marc Associates Design Build Firm ("Norman-Marc"). Soon thereafter, Getty chose, and the Board approved, Norman-Marc to serve as the first ever "Village Architect." Andrew M. Fernandez, Fernandez, Jr.'s younger brother and a licensed architect, occasionally provided architectural services to Norman-Marc. However, Norman-Marc was not a licensed architectural firm, and Fernandez, Jr. was not a licensed architect. Although the Board approved Norman-Marc's designation as "Village Architect," only Getty and Fernandez, Jr. negotiated the details of Norman-Marc's compensation. Getty agreed to pay Norman Marc $100 per hour for consulting work, in addition to commissions on construction projects equivalent to 9% of the total cost of each project.

In June 1996, the Board authorized Lyons to solicit bids for both the renovation of the Village Hall and the construction of a new Public Works garage. Combined, these projects were estimated to cost approximately $1 million. As the cost of these projects would exceed $10,000, Illinois law required Lyons to conduct a formal bidding process, awarding the construction contracts to the lowest qualified bidder. Lyons employed a pre-qualification process whereby potential bidders would submit pre-qualification questionnaires, requiring background and financial information. Lyons would review the submitted questionnaires prior to accepting bids on the projects in order to determine whether the bidder was sufficiently qualified for the projects.

After the Board approved the construction plans, Getty directed that a one-day notice soliciting pre-qualification applications be placed in the *Des Plaines Valley News*, a weekly newspaper with a circulation of 5,000, as opposed to the *Suburban Life Citizen*, which had a circulation of 30,000 and usually served as the forum for Village bid solicitations. The notice directed interested bidders to obtain the pre-qualification questionnaires from Lyons' Building Department Commissioner, Michael Kerrigan. Kerrigan testified at trial, however, that he never received any requests for pre-qualification questionnaires.

Evidence presented at trial revealed that Getty, Fernandez, Jr., and Fernandez, III caused pre-qualification questionnaires to be submitted by four companies – Randolph I. Anderson Development Company, Inc. ("Randolph"), Thompson Enterprises, Riverside Construction Corporation ("Riverside"), and Midwest Industrial Construction, Inc. ("Midwest").

Before trial, the parties stipulated that Randolph I. Anderson was a full-time practicing attorney and that Randolph, the construction company, did not exist. Anderson was a friend of the Fernandez family and personally agreed to submit a pre-qualification questionnaire. However, Anderson decided not to submit a bid on the projects.

Thompson Enterprises also was not a valid company. Jeffery Thompson was Fernandez, III's former classmate and friend. Thompson testified at trial that during the summer of 1996, Fernandez, III encouraged him to submit a bid for the projects. At the time, Thompson was employed as a computer systems analyst for the Square D Company. Thompson testified that in mid-August, he met with Fernandez, Jr. and Fernandez, III. At this meeting, the Fernandezes gave Thompson a completed pre-qualification questionnaire bearing the name "Thompson Enterprises." Although the questionnaire listed Thompson's home telephone number and address, Thompson testified that he was not affiliated with such a

company. Thompson also testified that most of the information on the questionnaire was false, including purported clients and information regarding previous projects. Additionally, the questionnaire was predated for July. Thompson also testified that during this meeting, Fernandez, Jr. calculated the dollar amounts that Thompson was to submit as bids for the projects. Fernandez, III and Thompson typed this information onto bid forms, and then Thompson signed his name. Fernandez, Jr. instructed Thompson not to talk to anyone from the Board who might try to contact him. Additionally, Fernandez, Jr. told Thompson to change his outgoing home answering machine message to indicate that the caller had reached Thompson Enterprises.

Riverside owner and long-time friend of Getty, Jack Andersen, testified that Getty personally requested that Riverside bid on the projects. Further, Andersen testified that Getty requested that Riverside "bid high." Andersen explained that Riverside was a union shop with prices generally too high for municipalities, and that Riverside primarily did concrete work. Andersen also stated that Getty filled out the pre-qualification questionnaire and the bid forms on behalf of Riverside. Andersen explained that on August 13, 1996, Getty visited Andersen's office and asked Andersen general questions about Riverside. During the visit, Getty presented Andersen with a blank pre-qualification questionnaire and bid forms, and asked Andersen to signed them. Anderson complied. Andersen testified that the following day he received from Getty, via facsimile, a completed pre-qualification questionnaire dated July 29, 1996, and completed bid forms for the two projects. He testified that all of the forms were going to be submitted on behalf of Riverside. Although the forms were purportedly completed by Riverside, Andersen testified that he did not complete any of them.

Finally, Fernandez, III submitted a pre-qualification questionnaire and bids on behalf of Midwest. Fernandez, III listed three clients as references for Midwest. All three clients

subsequently testified that Midwest had never done any work for them. Since 1994, Fernandez, III had worked as construction superintendent for a company named Industrial Construction, Inc. ("Industrial"). It was Fernandez, III's duty at Industrial to bid on projects. James Zakovec, the owner of Industrial, testified that he thought that Fernandez, III was bidding on the Lyons projects on behalf of Industrial, not on behalf of Midwest. Zakovec testified that eventually he and Fernandez, II agreed that Industrial would work as Midwest's subcontractor on the two projects.

Lyons awarded the contracts to Midwest because Midwest's bids were the lowest bids the Board received. Lyons agreed to pay Midwest $963,200 to complete the two projects. Midwest subcontracted with Industrial for $784,200. Thus, Midwest stood to make $179,000 on the completed projects.

It was not until after Midwest submitted the lowest bid and the Board selected Midwest's bid that Fernandez, III filed Articles of Incorporation in the State of Illinois for Midwest and sought an Employer Identification Number for Midwest. Additionally, Midwest did not secure worker's compensation and employer liability insurance until after the bids were awarded. Through his contacts in the insurance industry, Getty helped Midwest secure the insurance policies.

One month after receiving the contracts, Midwest opened a bank account. Fernandez, III and Fernandez, Jr. were the signatories on the account. By April, 1997, Fernandez, Jr. and Fernandez, III had deposited checks and cash from Lyons totaling $722,960. Evidence was presented at trial which revealed that Midwest wrote seven checks to "Cash" from the account, totaling $32,200. Additionally, $51,400 in checks were written to Fernandez family members and $17,521.79 in checks were used to pay personal, non-business expenses.

Additionally, throughout the aforementioned events, Norman-Marc was providing its purported architectural services to Lyons. Through December 1997, Norman-Marc

deposited checks from Lyons totaling approximately $148,000. Of that amount, $136,097.50 was related to work Norman-Marc had done on the two projects that had been awarded to Midwest. Between June 1996 and June 1997, checks totaling $126,450 were written from Norman-Marc's account to "Cash" and to various Fernandez family members.

During the course of construction, Fernandez, Jr. requested and Getty approved multiple change orders on the projects. The change orders added $320,219 to the amount Lyons owed Midwest. By the time a new building commissioner issued a "stop-work" order in April 1997, Midwest's net profit on the projects was $93,271.

On September 8, 1998, Getty, Fernandez, Jr., and Fernandez, III were charged in a twenty-one count Superseding Indictment. Counts 1 through 8, the mail fraud counts, detailed the bid-rigging scheme and provided that defendants devised to defraud Lyons of money and property by means of false and fraudulent pretenses, representations, and promises and material omissions; to deprive Lyons and its citizenry of their right to Getty's honest services as the mayor of Lyons; and to deprive Lyons and its citizenry of their right to Fernandez, Jr.'s honest services as Village Architect. Each count listed a different mailing used to further defendants' scheme to defraud Lyons and Lyons' citizenry.[1] Counts 9 through 12 charged defendants with obtaining by fraud funds in excess of $5,000

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[1] Count 1 charges defendants with a mailing sent to Midwest. Count 2 charges defendants with a mailing sent to Thompson Enterprises. Count 3 charges defendants with mailing Midwest's Article of Incorporation to the Secretary of the State of Illinois. Count 5 charges defendants with a letter containing an Employer Identification Number for Midwest. Count 6 charges defendants with a mailing from an insurer to Midwest containing Midwest's worker's compensation and employer liability insurance policy. Finally, Counts 7 and 8, charge defendants with mailing checks from Industrial to one of its subcontractors, Mathis Plumbing, for work Mathis Plumbing performed on the Lyons projects.

on four separate occasions from Lyons, a local government, which receives in excess of $10,000 per year under federal programs. Counts 13 through 17 charged defendants with knowingly engaging in a monetary transaction in criminally derived property of a value greater than $10,000, which was derived from mail fraud. Each of these counts listed an individual check drawn from Midwest's bank account in an amount greater than $10,000. Finally, Counts 18 through 21 charged defendants with conducting a financial transaction involving the proceeds of the mail fraud, with the intent to promote the carrying on of the mail fraud, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity. Again, each of these counts listed a separate check drawn from Midwest's bank account used to make partial payments to Industrial for construction work performed on the two projects.

On October 27, 1998, the jury returned a verdict finding Getty, Fernandez, Jr., and Fernandez, III guilty on all counts.

II. ANALYSIS

A. Mail Fraud

Defendants present three arguments in support of their assertion that their mail fraud convictions should be vacated. First, defendants claim that their activities fell beyond the

purview of 18 U.S.C. § 1341[2] and 1346[3] because the government failed to prove "a legally cognizable scheme to defraud." Second, defendants claim that their activities fell beyond the purview of 18 U.S.C. §§ 1341 and 1346 because the mailings that the government used as the basis for defendants' mail fraud convictions were not mailings used "in furtherance of a scheme." Third, defendants claim that neither the indictment nor the jury instructions embraced the concept of "materiality" as an essential element of mail fraud and therefore, because the government failed to establish an essential element of the crime, the defendants argue that they were not proven guilty beyond a reasonable doubt.

1. Scheme to Defraud

Defendants' first argument on appeal lacks merit and warrants minimal discussion. Defendants contend that the government needed to prove a "contemplated harm to the victim" in order to prove a "scheme to defraud." Normally, when a defendant challenges the sufficiency of the evidence presented, we review the evidence in a light most favorable to the government and if any evidence can support the conviction, the defendant's efforts must fail. *See United States v. Seward*,

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[2] Title 18 of The United States Code Section 1341 is entitled "Frauds and Swindles." It provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than five years, or both.

[3] Title 18 of the United States Code Section 1346 defines scheme to defraud, which includes "a scheme or artifice . . . designed to deprive another of the intangible right of honest services."

272 F.3d 831, 835 (7th Cir. 2001). In this case, however, we do not have to review the sufficiency of the evidence because to establish their *prima facie* case, the government did not have to prove a contemplated harm to a victim as the defendants contend. This court has repeatedly stated that to convict for mail fraud under 18 U.S.C. §1341, the government must prove three elements: (1) that the defendant participated in a scheme to defraud; (2) that the defendant intended to defraud; and (3) that the defendant used the mails in furtherance of the scheme. *See id.* This Circuit has never required the government to establish a "contemplated harm to the victim." Defendants' reliance on *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) ("[D]eceit must be coupled with a contemplated harm to the victim.") (quotation omitted) and on *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) (quoting *D'Amato*) is misplaced. Even if *D'Amato* were the law in this Circuit, defendants ignore the *D'Amato* court's explanation that fraudulent intent, which is essential to a scheme to defraud, may be *inferred* from the scheme "[w]hen the 'necessary result' of the actor's scheme is to injure others." 39 F.3d at 1257. In this case, the necessary result of the defendant's actions was to deprive Lyons and its citizenry of the opportunity to award and receive construction work at the most competitive price and the honest services of Getty and Fernandez, Jr. Contrary to defendants' assertion, we fail to find anything in the language of *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), to support their position that this Circuit requires the government to prove a contemplated harm to a victim. In *Bloom*, this court compared a violation of state-law fiduciary duties and federal mail fraud. *See id.* at 654-58 (explaining that in order to establish mail fraud under the intangible rights theory the government must show that an employee misused his position for private gain). *Bloom* says nothing about a contemplated harm to a victim, much less that such harm must be established in order to sustain defendants' convictions.

2. Mailings in Furtherance of the Scheme

Next, defendants argue that the government failed to prove that they used the mails in furtherance of a scheme to defraud. *See Seward*, 272 F.3d at 835. In challenging the sufficiency of the evidence against them, defendants "face [ ] the usual stringent standard of review: if the evidence presented at trial, taken in the light most favorable to the prosecution, can support the jury's conclusion, [defendants'] effort[s] must fail." *Id.*

Initially, defendants assert that any purported scheme ended on August 20, 1996, the date that Midwest was awarded the contracts by Lyons. Thus, they argue, because the mailings listed in counts 2 through 8 in the indictment all transpired after August 20, the mailings occurred after any purported scheme had ended. Further, defendants claim that even if the scheme did not end on August 20, the mailings listed in the indictment were ancillary to, and not in furtherance of, any purported scheme. We find defendants' arguments unpersuasive.

Defendants' scheme to defraud involved depriving Lyons and its citizenry of money and property and the honest services of Getty and Fernandez, Jr. Defendants' scheme did not end on August 20, as the defendants would have this court believe. Rather, defendants' scheme continued through April 1997 — when the stop-work order was issued — because until the stop-work order was issued, Midwest continued to receive payments from Lyons and defendants continued to conceal the truth about their bid-rigging scheme.

Moreover, in *Seward*, this court explained that while "the mail fraud statute does not reach every single use of the mails that is in any way remotely related to a scheme to defraud," a mailing will be considered in furtherance of the scheme if it is "incidental to an essential part of the scheme . . . In other words, the success of the scheme must in some measure depend on the mailing." *Id.* at 835-36 (citations omitted). We find that the mailings listed in Courts 2 through 8 are, in fact, essential parts of defendants' scheme. For example, Count 2 charges defendants with sending a letter to Thompson Enterprises

informing Thompson that it was not a successful bidder and Count 4 charges defendants with sending a letter from Getty to Midwest informing Midwest that its bid had been selected. These notifications were not merely ancillary to the execution of the fraud, rather, each of these letters furthered defendants' scheme by falsely portraying to anyone who examined Lyons' records that the bids submitted were legitimate, thereby concealing the true nature of the scheme. Similarly, the mailings in Counts 3 through 8 all contributed to the success of defendants' scheme.[4] Each mailing helped to further the scheme by falsely portraying the legitimacy of Midwest. Defendants needed Midwest to appear legitimate in order to collect payments from Lyons. Thus, the mailings charged in the indictment were in furtherance of the scheme to defraud.

3. Materiality

Finally, relying on *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), defendants argue that "materiality" is an essential element of mail fraud and because the indictment and the jury instructions failed to allege materiality, the government failed to prove an essential element of the crime. Thus, defendants contend that their convictions should be vacated. In *Neder*, the Supreme Court held that "materiality" is an essential element of "scheme to defraud" under the mail fraud statute. *See id.* This court has explained that "[a] false statement is material, [and thus may potentially establish violation of wire and mail fraud statutes], if it has a

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[4] Count 3 charges defendants with mailing Midwest's Articles of Incorporation to the Secretary of the State of Illinois. Count 5 charges defendants with a letter containing an Employer Identification Number for Midwest. Count 6 charges defendants with a mailing from an insurer to Midwest containing Midwest's worker's compensation and employer liability insurance policy. Finally, Counts 7 and 8 charge defendants with mailing checks from Industrial to one of its subcontractors, Mathis Plumbing, for work Mathis Plumbing performed on the Lyons projects.

natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Gee*, 226 F.3d 885, 891 (7th Cir. 2000)(quotation omitted).

Because defendants did not challenge the indictment prior to trial, the indictment will be deemed sufficient "unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." *United States v. Gooch*, 120 F.3d 78, 80 (7th Cir. 1997) (quotation omitted). We do not find the indictment to be so defective. The indictment alleged (1) that the defendants, by submitting three illegitimate bids, rigged the bidding process, (2) that defendants prepared false responses to pre-qualification questionnaires, and (3) that the defendants' scheme included "false and fraudulent pretenses, representations, and promises and material omissions" intended to cause Lyons to lose money and property. These allegations encompassed the concept of materiality. The defendants' alleged actions clearly would have influenced Lyons' decision to award the contracts to Midwest. Defendants knew that a reasonable person, particularly a Trustee voting on who to award the contracts to, would attach importance to such matters as whether the bidding company existed, whether the company had experience, and whether costs were projected by the company in good faith rather than contrived estimates.

With respect to the jury instructions, because defendants did not raise this objection in the court below, we review only for plain error. *See United States v. Olano*, 507 U.S. 725, 732-34, 1135 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). We will reverse only if the error was (1) clear and uncontroverted at the time of appeal and (2) affected substantial rights, which means the error affected the outcome of the district court proceedings. *See United States v. Holmes*, 93 F.3d 289, 292-93 (7th Cir.

1996) (quotation omitted).[5] While we recognize that the district court did not explicitly instruct the jury on "materiality," we find that, when viewed in their entirety, the jury instructions encompassed the concept of materiality.

In this case, the judge charged the jury: "In considering whether the government has proven a scheme to defraud, it is essential that one or more of the false pretenses, representations, promises and acts charged in the portion of the indictment describing the scheme be proved." The judge then stated that "[a] scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the loss of money or property to another or to deprive another of someone's honest services." Finally, the judge explained that "'intent to defraud' means that the acts charged were done knowingly with the intent to deceive or cheat a victim in order to cause a gain of money or property to the defendant or to deprive another of someone's honest services." Again, materiality has been defined as having "a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gee*, 226 F.3d at 891 (quotation omitted). We believe that these instructions adequately required the jury to find that the defendants made false representations which were capable of influencing, and thereby deceiving, Lyons. Thus, these instructions viewed in their entirety adequately embraced the concept of materiality. *See also United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 1999) (explaining that instructions adequately placed the question of materiality before the jury even though the instructions did not explicitly use the term

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[5] We are aware that the defendants argue that their objection to the jury instructions should be deemed timely because it was based upon an intervening Supreme Court decision. Although we do not find the defendants' argument persuasive, under a harmless error standard of review our decision would be the same.

"materiality"); *United States v. Pribble*, 127 F.3d 583, 589 (7th Cir. 1997)(same)[6]

B. Money Laundering Counts

Next, defendants challenge their money laundering convictions.[7] Defendants assert that the money laundering convictions and sentences should be vacated because the district court gave inconsistent and contradictory money laundering jury instructions. We do not agree with defendants' characterization of the jury instructions.

Because defendants did not object to the money laundering instructions at trial, we review defendants' challenge for plain error. *See Olano*, 507 U.S. at 732-34. Defendants were charged with violations of 18 U.S.C. §§ 1957(a) and 1956(a)(1)(A)(i).[8] The district court instructed the jury that the government must prove "[1] that the defendant engaged or attempted to engage in a monetary transaction, [2] that the defendant knew the transaction involved criminally derived

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[6] We reiterate what we stated in *Reynolds*, "[a]lthough there is no plain error here, in the future, given the Court's ruling in *Neder*, district courts should include materiality in the jury instructions for § 1344." 189 F.3d at 525 n.2.

[7] Defendants assert that independent of the mail fraud counts, the money laundering counts (13-21) cannot survive. Because we are affirming defendants' convictions under the mail fraud statute, it is not necessary to discuss this argument.

[8] 18 U.S.C. § 1956(a)(1)(A)(i) punishes "[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. §1957(a) punishes "[w]hoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity."

property, [3] that the property had a value greater than $10,000, [4] that the property was derived from mail fraud, and [5] that the transaction occurred in the United States." The district court then stated:

> The government must prove that the defendant knew that the property represented the proceeds of some form of activity that constitutes a felony under state or federal law. The government is not required to prove that the defendant knew that the property involved in the transaction represented the proceeds of mail fraud.

Defendants argue that initially the district court instructed the jury that in order to sustain the money laundering counts, the criminally derived property had to be derived from mail fraud. Then, according to defendants, the district court told the jury that the government needed only to prove that the property represented the proceeds of some form of activity that constitutes a felony under state or federal law. Defendants now argue on appeal that these instructions were confusing and directly contradictory.

Defendants, however, fail to see the difference between the relevant instructions. As stated in the instructions, the government did not need to prove that the defendants *knew* the criminally derived property was derived from mail fraud, only that the defendants *knew* that the transaction involved some form of criminally derived property. Additionally, the government needed to prove that the criminally derived property was, *in fact,* derived from mail fraud. The instructions in question presented these two different elements that the government needed to establish. The jury instructions were neither inconsistent nor contradictory.

C. Theft of Funds

Finally, defendants argue that their convictions under 18 U.S.C. § 666 should be vacated.[9] Defendants assert that the government failed to establish a necessary element of the offense, the requisite link between a federal interest and the defendants' fraud. We do not believe that it is necessary for the government to establish such a link. Section 666 punishes an agent of a local government who obtains through fraud property valued at $5,000, or more, from a local government that

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[9] Title 18 of the United States Code section 666 provides in part:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—(i) is valued at $5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

receives, in any one-year period, benefits in excess of $10,000 from federal funds. *See* 18 U.S.C. § 666. In *United States v. Grossi*, a township supervisor was convicted of taking bribes in exchange for payments out of the town's general assistance program in violation of 18 U.S.C. § 666. 143 F.3d 348, 349-50 (7th Cir. 1998). On appeal the defendant asserted that since the township's general assistance program was funded entirely by local sources, the requirement that the local government receive $10,000 in federal funds was not satisfied. *See id.* at 350. In reply to the defendant's argument, this court explained that "money is fungible and its effect transcends program boundaries." *Id.* Because the parties stipulated at trial that Lyons received over $10,000 under a federal program in 1996 and 1997, it was not necessary for the government to further establish a link between the defendants' fraud and a federal interest. *See id.*

III. CONCLUSION

For the foregoing reasons, we AFFIRM the convictions of Getty, Fernandez, Jr., and Fernandez, III.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 CR 835

UNITED STATES OF AMERICA,
Plaintiff,

v.

KENNETH K. GETTY, et al.,
Defendants.

November 4, 1999, Decided

MEMORANDUM OPINION AND ORDER

RUBEN CASTILLO, Judge.

On October 27, 1998, a jury returned a guilty verdict against Kenneth Getty[1] on a twenty-one count indictment charging him with mail fraud and money laundering offenses.[2] Specifically, Getty, the former President of the Village of Lyons, was convicted of scheming to defraud the Village by rigging bids submitted for municipal building projects and then laundering the proceeds. This Court entered the jury's verdict on October

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[1] The jury simultaneously returned a verdict against Getty's co-defendants Peter N. Fernandez, Jr., and Peter N. Fernandez, III.

[2] Counts 1 through 8 charged Getty with mail fraud in violation of 18 U.S.C. § 1341; counts 9 through 21 charged Getty with theft of funds in violation of 18 U.S.C. § 666; counts 18 through 17 charged Getty with engaging in monetary transaction in property derived from unlawful activities in violation of 18 U.S.C. § 1957; and counts 18 through 21 charged Getty with laundering monetary instruments in violation of 18 U.S.C. § 1956.

30 in an order that extended the time to file any post-trial motions until December 1, 1998. (R. 83-1). We denied Getty's timely motions for judgment of acquittal notwithstanding the verdict, (R. 90-1), and for a new trial, (R. 91-1). (*See* R. 92-1, Order of Dec. 9, 1998.) Shortly thereafter, Getty's attorney withdrew. (*See* R. 94-1, Order of Jan. 22, 1999 (granting counsel's motion to withdraw).)

Getty's new representative filed a third post-trial motion on July 1, 1999, arguing that the Supreme Court's intervening decision in *Neder v. United States*, 119 S. Ct. 1827 (1999), establishes that our jury instructions were faulty and that Getty is entitled to a new trial. The government opposes Getty's motion on the grounds that we are without authority to entertain the untimely motion. Alternatively, the government contends that Getty waived any challenge to the jury instructions by failing to contemporaneously object and that, even if the instructions were incorrect, any error was harmless.

After careful consideration, we deny Getty's untimely motion. As required by Federal Rule of Criminal Procedure 33, this Court extended the time for post-trial motions until December 1, 1998 during the seven-day period immediately following the verdict. Now, ten months after the jury returned its verdict and nine months after post-trial motions were due, Rule 45(b) proscribes any further extension: "[T]he court *may not* extend the time for taking any action under Rules 29 [and] 33." Fed. R. Crim. P. 45(b) (emphasis added); *see also United States v. Holt*, 170 F.3rd 698, 702-03 (7th Cir. 1999) ("[T]he district court had no discretion to extend the time for filing a motion for a new trial once the 7-day period had expired.").

Getty does not direct our attention to any authority empowering this Court to consider his law motion for a new trial, nor has our independent research revealed any. Instead, he argues that we *must* have the power to rectify our alleged mistake otherwise, according to Getty, Rule 2's admonition to

interpret the rules with an eye to justice and eliminating unjustifiable expense and delay would be superfluous.

Getty's equity-based argument falters in the face of Rule 45(b)'s explicit limitation on our power to extend the time for post-trial motions. *Compare United States v. Hocking*, 841 F.2d 735, 736 (7th Cir. 1988) ("Rule 45(b) means what it says. As a result, a court lacks adjudicatory power to dispose of an untimely motion under Rules 29 [and] 33." (citations omitted)); *United States v. Hill*, 826 F.2d 507, 508 (7th Cir. 1987) ("Rule 45(b) establishes that the deadline is inflexible."). Because Rule 45(b) establishes that the deadline in Rule 33 in inflexible, and because Getty's third post-trial motion was filed long after the December 1, 1998 deadline expired, this Court lacks the adjudicatory power to decide the motion. For that reason we deny Getty's July 1999 motion.[3]

Even if Getty were right and equity demands courts to correct alleged errors if they have any opportunity to do so, we would deny his motion on the merits. In *Neder*, decided approximately seven months after Getty was convicted, the Supreme Court held that "materiality of falsehood is an element of the federal mail fraud . . . statutes." 119 S. Ct. at 1841. In other words, *Neder* requires a jury instruction on the materiality element. *See United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 1999) ("[I]n the future, given the Court's ruling in *Neder*, district courts should include materiality in the jury instructions for [mail fraud]."). Our instructions to Getty's jury did not explicitly mention materiality and, for this reason, Getty believes he deserves a new trial.

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[3] The government suggests that we treat Getty's motion for a new trial as a motion under 28 U.S.C. § 2255. We decline to do so without Getty's explicit authorization because of the drastic consequences such treatment would have for any future § 2255 motion by Getty. *See* § 2255 ¶ 8 (severely limiting second or successive collateral attacks by a federal prisoner).

In general, when a court fails to instruct a jury on an essential element of the crime, the omission is subject to harmless-error analysis. *Neder*, 119 S. Ct. at 1837. An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. *Id.* But here, Getty neither asked for a materiality instruction, nor objected to the lack of a materiality instruction. Therefore, we may review for plain error. *Reynolds*, 189 F.3d at 525 n.2. Under either standard, however, Getty's argument fails.

A false statement or omission is material when it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed." *United States v. Pribble*, 127 F.3d 583, 587 (7th Cir. 1997). The Seventh Circuit has repeatedly held that "fraud embodies the concept of materiality." *Pribble,* 127 F.3d at 589; *see also Reynolds*, 189 F.3d at 525 n.2 (quoting *Pribble*); *Perlman v. Zell*, 185 F.3d 850, 854 (7th Cir. 1999) ("The word 'fraud' in the mail-fraud statute means deliberate, material misrepresentations."); *United States v. Coffman*, 94 F.3d 330, 335 (7th Cir. 1996) ("Fraud is a *material* misrepresentation or omission." (emphasis in original)).

This Court gave Getty's jury instructions virtually identical to those given, and held to embody the concept of materiality, in *Pribble* – tailored, of course, to mail fraud rather than bank fraud. *Compare Pribble*, 127 F.3d at 589 (discussing fraud instructions that adequately put the issue of materiality before the jury); *see also Reynolds*, 189 F.3d at 525 n.2 (affirming Reynolds' conviction because the jury instructions were "virtually identical" to those given in *Pribble*). As in *Pribble*, we instructed the jury that to find Getty guilty the government had to prove beyond a reasonable doubt that Getty "knowingly devised or participated in a scheme to defraud, or a scheme to obtain money or property by false pretenses, representations or promises . . . [and] that [he] did so knowingly and with the intent to defraud." (Inst. 19.) Additionally, we defined a "scheme to defraud" as "a scheme that is intended to deceive or

cheat," (Inst. 20), and told the jury that Getty must have acted "knowingly with the intent to deceive or cheat a victim . . . to cause a gain of money or property," (Inst. 21). As in *Pribble*, these instructions adequately placed the issue of materiality before the jury. For this reason, our failure to explicitly instruct the jury on materiality did not contribute to the verdict and, thus, was harmless.

Furthermore, all of the evidence presented established the materiality of Getty's lies and omissions, nor does Getty argue otherwise. Getty's fraudulent scheme was to get the Village to award two building contracts to Fernandez III's non-existent construction company. To this end, he arranged to have two other non-existent companies submit high bids and for one legitimate company to submit an artificially high bid (and assisted in the preparation of those three fake bids). Getty repeatedly lied to the Village Board of Trustees for the purpose of influencing its decision: he told the Board that he had researched the bidding "companies" during a fictional "prequalification process" (which he also arranged), explicitly announced to the Board that the bids were legitimate, declared that he had no conflict of interest, and detailed a fictional review of the bidding process (and the bids) purportedly conducted by the Village attorney. Each of these lies, misrepresentation, and machinations was intended to influence the Board in its decision to award the building contracts. Thus, even if we had included a materiality instruction, the outcome of Getty's trial would not have been any different, and the lack of such instruction was harmless.

CONCLUSION

We deny Getty's motion for a new trial because it is untimely, and we have no authority to decide it. Even if we had such authority, however, we would deny the motion because the lack of an explicit materiality instruction was harmless; it did not contribute in any way to the jury's guilty verdict.

The Court will proceed to address all pending sentencing issues at sentencing, which is hereby set for all the defendants on December 8, 1999, at 1:30 p.m.

APPENDIX C

18 U.S.C. § 666: Theft or bribery concerning programs receiving Federal funds.

(a) Whoever, if the circumstance described in subsection (b) of this section exists-- (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof-- (A) embezzles, steals obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that-- (i) is valued at $5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section-- (1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative; (2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program; (3) the term "local" means of or pertaining to a political subdivision within a State; (4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and (5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense.

APPENDIX D

18 U.S.C. § 1341: Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, or any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX E

18 U.S.C. § 1346: Definition of Scheme or artifice to defraud:

For purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

APPENDIX F

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX H

Federal Rule of Criminal Procedure 52: Harmless Error and Plain Error:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-209

In the Supreme Court of the United States

PETER N. FERNANDEZ, III, PETER N. FERNANDEZ, JR., AND KENNETH K. GETTY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 666 requires the government to establish a nexus between the defendant's conduct and a federal interest.

2. Whether the district court committed reversible error by failing to instruct the jury sufficiently that materiality is an element of mail fraud.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 282 F.3d 500. The opinion of the district court (Pet. App. 19a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2002. On May 24, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 4, 2002 and the petition was filed on August 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioners were convicted of eight counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346; four counts of obtaining money by fraud from a local government that receives funds from a federal program, in violation of 18 U.S.C. 666; five counts of engaging in monetary transactions in property derived from mail fraud, in violation of 18 U.S.C. 1957; and four counts of money laundering, in violation of 18 U.S.C. 1956. Pet. App. 2a. Petitioner Getty was sentenced to 66 months' imprisonment; petitioner Fernandez, Jr. was sentenced to 60 months' imprisonment; and petitioner Fernandez, III was sentenced to 48 months' imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 1a-18a.

1. In March 1996, the Board of Trustees of the Village of Lyons (Board) selected petitioner Getty to serve as acting mayor. Pet. App. 2a. The mayor is a voting member of the Board and has veto power over its decisions. Gov't C.A. Br. 2. After assuming office, Getty selected, and the Board approved, Norman-Marc Associates Design Build Firm (Norman-Marc) as Village Architect, a position that had not previously existed. Pet. App. 3a. Petitioner Fernandez, Jr., a friend of Getty's, owned Norman-Marc. *Ibid.* Norman-Marc was not a licensed architectural firm, and Fernandez, Jr. was not a licensed architect. *Ibid.* Getty agreed to pay Norman-Marc $100 per hour in consulting fees and a 9% commission on Lyons' construction projects. *Ibid.*

In June 1996, the Board authorized the solicitation of bids for two municipal construction contracts. Pet. App. 3a. Illinois law requires contracts to be awarded to the lowest qualified bidder. *Ibid.* Lyons required potential bidders to submit an application detailing their

experience and financial background. *Ibid.* Getty directed that the announcement soliciting bids run for one day in a newspaper with a circulation of 5000, rather than in a larger paper that the village had used before. *Id.* at 4a. The notice directed prospective bidders to the Building Department Commissioner for qualification questionnaires. *Ibid.* The Building Commissioner never received any inquiries. *Ibid.*

Petitioners arranged to have three companies bid on the project. Jeffery Thompson bid on the projects in the name of Thompson Enterprises, a non-existent company. Pet. App. 4a-5a. Fernandez, Jr. and Fernandez, III provided most of the information in Thompson's bid, including the dollar amounts. *Id.* at 5a. Fernandez, Jr. told Thompson not to talk to any Board member about the bid. *Ibid.* Getty asked his friend Jack Anderson to bid on the projects, but specified that his friend should "bid high." *Ibid.* Getty prepared and submitted the bid. *Ibid.*

Finally, Fernandez, III submitted the low bid on behalf of a company called Midwest Industrial Construction, Inc. Pet App. 5a-6a. The qualification questionnaire listed three client references, but Midwest had not worked for any of them. *Ibid.* Getty falsely told the Board that he had researched the bidding companies, that the bids were legitimate, that he had no conflict of interest, and that the village attorney had reviewed the bidding process. *Id.* at 23a. The village awarded the contracts to Midwest as the lowest bidder for $963,200. *Id.* at 6a.

Fernandez, III then incorporated Midwest, obtained insurance, workers' compensation, and an Employer Identification Number, and opened a bank account. Pet. App. 6a. Midwest subcontracted its contracts to Fernandez, III's employer, Industrial Construction,

Inc., for $784,200. *Ibid.* During the course of the projects, Getty approved additional payments to Midwest of $320,219. *Id.* at 7a. In April 1997, the village stopped Midwest's work on the project. *Ibid.* By then, Midwest had earned a net profit of $93,271. *Ibid.*

2. After petitioners were found guilty on all counts, the district court set a deadline of December 1, 1998, for post-trial motions. Pet. App. 20a. On July 1, 1999, petitioners filed a post-trial motion challenging their jury instructions based on *Neder* v. *United States*, 527 U.S. 1 (1999), which held that materiality is an element of mail fraud. 7/1/99 Pet. Post-Trial Mot. The district court denied the motion as untimely and, in the alternative, held that any error was harmless. Pet. App. 20a-23a.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-18a. The court rejected petitioners' contention that their convictions under Section 666 should be vacated because the government did not establish a "link between a federal interest and the [petitioners'] fraud." *Id.* at 17a. Relying on its prior decision in *United States* v. *Grossi*, 143 F.3d 348, cert. denied, 525 U.S. 879 (1998), the court held that it is not necessary for the government to establish such a link. Pet. App. 17a-18a. The court also rejected petitioners' contention that their mail fraud convictions should have been vacated because the indictment did not charge, and the jury instructions did not require the jury to find, materiality. *Id.* at 12a-14a. Reviewing for plain error, the court of appeals concluded that both the indictment and the district court's jury instructions sufficiently charged materiality. *Id.* at 12a-15a.

ARGUMENT

1. Petitioners contend (Pet. 5-17) that review is warranted to resolve a conflict in the circuits on the

question whether 18 U.S.C. 666 requires the government to establish a nexus between the defendant's conduct and a federal interest. Review of that issue is not warranted in this case.

Section 666 makes it illegal for an agent of a local government to obtain by fraud the property of that government, when the local government "receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. 666(a)(1)(A) and (b). The parties stipulated at trial that Lyons received more than the required $10,000 from federal programs in the years in which petitioners' alleged misconduct occurred. Pet. App. 18a.

In *Salinas* v. *United States*, 522 U.S. 52 (1997), a sheriff and deputy sheriff were prosecuted under 18 U.S.C. 666(a)(1)(B) for accepting a bribe from a federal prisoner for contact visits. The Court held that Section 666(a)(1)(B) does not require the government to show that a bribe had any particular effect on federal funds. The Court did not decide whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, because the bribe in that case satisfied any possible statutory nexus requirement. The Court explained that the bribe "was related to the housing of a prisoner in facilities paid for in significant part by federal funds," and "that relationship is close enough to satisfy whatever connection the statute might require." 522 U.S. at 59. The Court in *Salinas* also ruled that there was "no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of [that] case." *Id.* at 60. The Court explained that the preferential treatment given to the inmate "was a threat to the integrity and proper operation of the federal program." *Id.* at 61.

In the wake of *Salinas*, the courts of appeals have taken divergent approaches on the reach of Section 666. In *United States* v. *Dakota*, 197 F.3d 821, 826 (1999), the Sixth Circuit held that Section 666 "does not require a nexus between the alleged bribes and the federal funding received." Similarly, the Seventh Circuit has held that Section 666 does not require the government to establish a "link between a federal interest and the defendants' fraud." Pet. App. 17a; see *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998). In contrast, the Second Circuit has held that there must be "at least some connection between the bribe and a risk to the integrity of the federal funded program." *United States* v. *Santopietro*, 166 F.3d 88, 93 (1999). And the Third Circuit has held that Section 666 "requires that the government prove a federal interest is implicated by the defendant's offense conduct." *United States* v. *Zwick*, 199 F.3d 672, 687 (1999).[1]

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[1] Two other circuits have recently addressed the issue. In *United States* v. *Lipscomb*, 299 F.3d 303 (2002), a divided panel of the Fifth Circuit upheld a prosecution under Section 666, with only two of the three judges expressing a view on the permissible reach of that provision. Compare *id.* at 332-333 (Wiener, J.) (finding Section 666 constitutional as applied to corruption prosecution of former city counsel member), with *id.* at 373 (Smith, J., dissenting) (finding Section 666 unconstitutional as so applied). In *United States* v. *Edgar*, No. 00-14144, 2002 WL 31028287 (Sept. 12, 2002), the Eleventh Circuit upheld a prosecution under Section 666 for theft of funds from a hospital that received federal funds under the Medicare, Part A, program. The court took note (*id.* at *4) of the limitations on the reach of the statute found by the *Zwick* and *Santopietro* courts, but concluded that, in light of *Fischer* v. *United States*, 529 U.S. 667 (2000), those limitations "are built into § 666(b)'s requirement that recipient entities receive at least $10,000 in federal 'benefits' over the course of a year" under

This case is not an appropriate vehicle for resolving the divergence among the circuits on the reach of Section 666, because petitioners' conduct satisfies the nexus requirement that the Second and Third Circuits have established. In this case, the mayor of Lyons, acting in conjunction with petitioners Fernandez, Jr. and Fernandez, III, engaged in a scheme to defraud the village. Because the chief executive officer of a municipality has wide-ranging authority over all of a municipality's programs, his criminal conduct in relation to a municipal program necessarily poses a threat to the municipality's proper administration of federal funds.

The substantial connection between the fraudulent conduct of a municipality's chief executive officer and the federal government's interest in a municipality's proper administration of federal funds is more than sufficient to satisfy the Second and Third Circuits' nexus requirements. When a municipality's chief executive defrauds a municipality that receives federal funds, there is, as the Second Circuit requires, "some connection between the [fraud] and a risk to the integrity of the federal funded program." *Santopietro*, 166 F.3d at 93. And, as the Third Circuit requires, "a federal interest is implicated by the defendant's offense conduct." *Zwick*, 199 F.3d at 687.

Nothing in the Second and Third Circuits' decisions suggests that those courts would fail to find a sufficient nexus when the defendant is a chief executive of a municipality that receives more than $10,000 in federal funds. In *Santopietro*, the Second Circuit expressly

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"sufficiently comprehensive programs"; that inquiry, the court concluded, is broad enough "to assure that applications of § 666 remain within constitutional bounds."

reserved the question whether a defendant's status as a chief executive officer would be sufficient to satisfy that circuit's nexus requirement. The court explained that, because it had affirmed the Section 666 convictions before it on a different ground, "[w]e need not consider whether Santopietro's role as mayor—the chief executive officer of the city and hence the officer ultimately responsible for all city departments—would render the statute applicable to corrupt payments received by him for any transaction involving the city." 166 F.3d at 94 n.3. *Zwick* did not involve a chief executive, and the Third Circuit did not discuss the potential significance of a defendant's having that status. The court emphasized, however, that "a highly attenuated implication of a federal interest will suffice for purposes of § 666." 199 F.3d at 687. If a "highly attenuated" federal interest is sufficient to satisfy the Third Circuit's nexus requirement, a significant federal interest at issue when the scheme to defraud involves a municipality's chief executive also satisfies the Third Circuit's requirement.

Moreover, in describing the kind of case that would fail to satisfy their nexus requirement, both the Second and Third Circuits gave as an example a case in which the government sought to prosecute the city's meat inspector just because the city's parks department had received more than $10,000 in federal funds. *Santopietro*, 166 F.3d at 93; *Zwick*, 199 F.3d at 687. A prosecution based on a fraud committed by a municipality's chief executive does not remotely resemble that hypothetical prosecution.

In sum, the prosecution in this case satisfies the nexus requirement imposed by the Second and Third Circuits. This case therefore does not present an appropriate occasion for the Court to decide whether Section 666 imposes such a requirement.

Furthermore, the resolution of the nexus question would not have a significant practical affect on petitioners. Because petitioners' sentences were imposed concurrently, vacation of their Section 666 convictions alone would affect only the size of their special assessments. For that reason as well, review of the nexus question is not warranted in this case.

2. Petitioners contend (Pet. 17-22) that the district court committed reversible error by failing to instruct the jury that materiality is an element of mail fraud as required by *Neder* v. *United States*, 527 U.S. 1 (1999). That contention is without merit and does not warrant review.

Under Federal Rule of Criminal Procedure 30, "[n]o party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict." Because petitioners did not raise their materiality claim before the jury retired to consider its verdict, that claim is subject to review only for plain error. *Jones* v. *United States*, 527 U.S. 373, 387-389 (1999).

Petitioners argue (Pet. 18) that plain-error review is inapplicable because they raised their claim in a post-trial filing. But under the terms of Rule 30, a post-trial filing is not sufficiently timely to avoid plain-error review. Moreover, petitioners raised their post-trial materiality claim long after the deadline for post-trial motions established by the district court. Pet. App. 20a. The court of appeals therefore correctly reviewed petitioners' materiality claim under a plain-error standard.

In order to obtain relief under a plain error standard, a defendant must show that the error (1) is plain or obvious, (2) affects substantial rights, and (3) seriously affects the fairness, integrity, or public reputation of

judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioners failed to satisfy those standards.

First, as the court of appeals concluded, petitioners failed to show that any error in the instructions was plain or obvious. In *Neder*, the Court held that 18 U.S.C. 1341 requires proof that the defendants executed a fraudulent scheme involving misrepresentation or concealment of a material fact. 527 U.S. at 20-22. A material fact is one that a reasonable person would consider important in determining his choice of action or one that the defendant knew or had reason to know that the victim would actually consider important. *Id.* at 22 n.5. It is not plain or obvious that the district court's instructions conflict with *Neder*.

The district court gave the following instructions:

> In considering whether the government has proved a scheme to defraud, it is essential that one or more of the false pretenses, representations, promises or acts charged in the portion of the indictment describing the scheme be proved, establishing the existence of a scheme beyond a reasonable doubt. However, the government is not required to prove all of them.
>
> A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the loss of money or property to another or to deprive another of someone's honest services.
>
> The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat a victim in order to cause a gain of

> money or property to the defendant or to deprive another of someone's honest services.

Gov't C.A. Br. 41.

Those instructions did not specifically use the term materiality. But as the court of appeals explained, the instructions sufficiently conveyed to the jury that petitioners could be convicted only if it found that petitioners "made false representations which were capable of influencing, and thereby deceiving, Lyons." Pet. App. 14a. At the very least, it is not plain or obvious that the instructions were fatally deficient.

Nor have petitioners satisfied the other preconditions for obtaining relief under a plain-error standard. The evidence in this case overwhelmingly established that petitioners' fraudulent conduct was material. As the district court explained, Getty "repeatedly lied to the Village Board of Trustees for the purpose of influencing its decision." Pet. App. 23a. In particular, petitioners arranged for three companies to submit fraudulent bids that would make Midwest the low bidder, and Getty falsely told the Board that he had researched the three companies, that the bids were legitimate, that he had no conflict of interest, and that the bids had been reviewed by the village attorney. *Ibid.* No rational jury that found that petitioners engaged in that conduct could have failed to find that their conduct was material to the Board's decision to award the construction contracts to Midwest. Thus, any error in the jury instructions neither affected substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Neder*, 527 U.S. at 16 (omission of materiality instruction does not warrant relief on harmless error review when the evidence was overwhelming and

incontrovertible); *Johnson*, 520 U.S. at 466-467 (same, on plain-error review).

In any event, the court of appeals in this case cautioned district courts to include a specific materiality instruction in future cases. Pet. App. 15a n.6. The question whether the instructions in this case adequately charged the jury on materiality therefore does not raise any issue of recurring importance that warrants this Court's review.[2]

3. Finally, petitioners contend (Pet. 21) that *United States* v. *Handakas*, 286 F.3d 92, 100-112 (2d Cir.), cert. denied, No. 02-5086 (Oct. 7, 2002), "cannot be disregarded." That decision, however, has no relevance here. In *Handakes*, the Second Circuit held unconstitutionally vague a charge that a general contractor deprived a state agency of honest services by falsely certifying in his contract that he was paying prevailing

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[2] While petitioners' question presented (Pet. i) refers to the failure of the indictment to identify materiality as an element of the offense, the body of the petition (Pet. 17-22) does not develop that argument. That question is therefore not properly presented here. In any event, because petitioners raised the indictment issue for the first time on appeal, it is subject to review only for plain error. *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002). That standard is not satisfied here. *Neder* held that the term "defraud" in the mail fraud statute incorporates the common-law requirement of materiality. See 527 U.S. at 21-25. The indictment used the same term, charging that petitioners "devise[d] * * * and participated in a scheme and artifice to defraud." Superseding Indictment 5 para. 2. Accordingly, it is not plain or obvious that the indictment conflicts with *Neder*. Furthermore, as discussed above, the evidence overwhelmingly establishes that petitioners' actions were material. Any deficiency in the indictment therefore neither affected petitioners' substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Cotton*, *supra* (plain-error review).

wages to his employees. *Ibid.* To the extent that petitioners are challenging their convictions on vagueness grounds, that contention is not properly presented here. Petitioners did not raise that contention in the court of appeals, and that contention is not included in their questions presented. In any event, any vagueness challenge would be insubstantial on the facts of this case. A village is plainly deprived of honest services when its mayor and village architect engage in a fraudulent bid rigging scheme that is designed to cause the village to overpay for municipal construction.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The vagueness question also does not warrant review based on *Handakas* because on July 8, 2002, the Second Circuit granted rehearing en banc in *United States* v. *Ribicki*, to address whether 18 U.S.C. 1346, defining a scheme to defraud to include a scheme to deprive another of the intangible right to honest services, is unconstitutionally vague on its face. See *United States* v. *Rybicki*, 287 F.3d 257 (2d Cir. 2002) (panel opinion affirming conviction). Until the Second Circuit has clarified its position, there is no need for this Court's intervention.

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In the Supreme Court of the United States

PETER N. FERNANDEZ, III, PETER N. FERNANDEZ, JR., AND KENNETH K. GETTY,

Petitioners,

v.

UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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The United States acknowledges that the courts of appeals are divided on the question of whether 18 U.S.C. § 666 requires a nexus between the alleged offense conduct and a federal government interest. Opp. 6. Compare *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999) (Section 666 requires the government to show some connection between a federal interest and the bribe); *United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999) (same), with *United States* v. *Fernandez*, 282 F.3d 500, 511 (7th Cir. 2002) (Section 666 does not require a nexus or link between a federal interest and the bribe); *United States* v. *Suarez*, 263 F.3d 468, 489-91 (6th Cir. 2001).[1]

The divided panel decisions in *Suarez* and *United States* v. *Lipscomb*, 299 F.3d 303 (5th Cir. 2002), both of which generated strong, well-reasoned dissents on the issue presented here, highlights the division among the circuits. In *Suarez*, Judge Boggs agreed with the Second and Third Circuits, reasoning that "the jurisdictional requirement of minimal federal nexus is a necessary element of 18 U.S.C. § 666 in order to maintain the constitutionality of the statute." 263 F.3d at 488 (Boggs, J., dissenting). To decide otherwise "would

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[1] The Eleventh Circuit has also recently addressed the issue in *United States* v. *Edgar*, 304 F.3d 1320 (11th Cir. 2002). In affirming the conviction of officers of a hospital that received reimbursements under the Medicare, Part A program, the Eleventh Circuit acknowledged the constitutional concerns expressed in *Zwick* and *Santopietro*. However, given this Court's construction of the term "benefits" in *United States* v. *Fischer*, 529 U.S. 667 (2000), the court concluded that the necessary constitutional limits "are built in to § 666's requirement that recipient entities receive at least $10,000 in federal 'benefits' over the course of a year." 304 F.3d at 1325. In addition, the court noted that "*Fischer* clearly vindicated § 666's constitutionality as applied to the defrauding of entities funded by Medicare." *Id.* at 1329.

make § 666 a generalized anti-corruption statute under the spending power." *Id.* at 489 (quotation omitted).

In *Lipscomb*, two judges of a triply divided panel considered an as applied challenge to the constitutionality of Section 666. Judge Wiener determined that Congress's interest in preventing federal funds from passing through state and local government bodies and agencies whose members and agents are corrupt suffices to make Section 666 "necessary and proper to Congress's exercise of its spending power." 299 F.3d at 336-37 (Weiner, J.). Accordingly, in Judge Weiner's view, Section 666 requires only that federal funds pass through the governmental body or agency; the government need not prove any nexus or connection between the federal funds or programs and the bribery.

In contrast, Judge Smith argued that for prosecutions under Section 666 to be constitutional, there must be some relationship between federal funds or programs and the bribery. 299 F.3d at 372 (Smith, J., dissenting) ("it cannot be a necessary and proper to executing the federal spending power for the government to prosecute local crimes that have no relationship whatsoever to federal funds and programs"). Like Judge Boggs, Judge Smith went on to note that if Section 666 did not require any relationship between federal funds or programs and the bribery, then the statute "would become a general federal police power statute that criminalizes corruption in all local governments and private agencies receiving federal funds." *Id.*[2]

Implicitly acknowledging that the divergent decisions of the courts of appeals cannot be harmonized, the United States is limited to contending that this case is not an "appropriate vehicle" for resolving the circuit split. Opp. 7. In this regard,

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[2] Judge Duhé, the third member of the panel, did not reach the constitutional question, because he did not believe it to be properly before the court. See 299 F.3d at 360 (Duhé, J., dissenting in part).

the government principally argues that this case does not present an appropriate vehicle because petitioners' conduct "satisfies the nexus requirement that the Second and Third Circuits have established." *Id.*

In particular, the government argues that petitioners meet the standard set forth in *Santopietro* and *Zwick* because the alleged bribery here involved the chief executive of a municipality. Opp. 7-8. The government contends that a defendant's status as the chief executive of an organization that receives federal funds *ipso facto* satisfies the nexus between a federal interest and the offense conduct required by the Second and Third Circuits. The government is incorrect. The basis for the government's contention is a solitary dictum in a footnote (that makes note of the issue and reserves it for another day) in *Santopietro*. See 166 F.3d at 94 n.3, cited at Opp. 8. But nothing in the holdings of *Zwick* (which does not mention the chief executive issue) or *Santopietro*, or the dissents of Judges Smith and Boggs in *Lipscomb* and *Suarez*, suggests that these courts or judges would find a defendant's status as a chief executive to suffice under Section 666. The government's argument regarding the status of one of the petitioners as a chief executive thus properly belongs in its merits brief or its brief on remand—not in its opposition to the petition for certiorari.

The government also briefly contends that the resolution of the first question presented "would not have a significant practical effect on petitioners," because petitioners' sentences are being served concurrently and vacatur of their Section 666 convictions "would affect only the size of their special assessments." Opp. 9. Notwithstanding the government's assertion to the contrary, both a decrease in petitioners' special assessments, as well as the prospect of one fewer felony conviction, are matters of significant importance to petitioners.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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